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KOOTENAI ENVIRONMENTAL ALLIANCE

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

KOOTENAI ENVIRONMENTAL
ALLIANCE, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS, a federal agency, JAMES C.
DALTON, in his official capacity, COL.
BRUCE ESTOK, in his official capacity,
BRIAN APPLEBURY, in his official
capacity, and MARK OHLSTROM, in his
official capacity,

Defendants.

) Case No.:

)
) **COMPLAINT FOR**
) **DECLARATORY AND**
) **INJUNCTIVE RELIEF**

)
) **Violations of Administrative Procedure**
) **Act (5 U.S.C. §§ 553, 706); National**
) **Environmental Policy Act (42 U.S.C. §**
) **4321 et seq.)**

1 Kootenai Environmental Alliance, by and through its counsel, hereby alleges:

2 **I. INTRODUCTION**

3 1. This action arises out of the U.S. Army Corps of Engineers (“Army Corps”)
4 violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-70, the
5 Administrative Procedures Act (“APA”), 5 U.S.C. § 553 and 5 U.S.C. § 706(2)(A), the Army
6 Corps’ implementing regulations, and caselaw. The Army Corps failed to complete any
7 environmental analysis of its Engineering Technical Letter and failed to complete any
8 environmental review of its Final Periodic Inspection Report for the Rosenberry Levee.

9 2. In April 2009, the Army Corps issued an Engineering Technical Letter (“ETL”)
10 requiring removal of non-grass vegetation from all of the Nation’s levees. Civil Works,
11 Engineering & Construction Division, United States Army Corps of Engineers, Department of
12 the Army, ETL 1110-2-571, *Guidelines for Landscape Planting and Vegetation Management at*
13 *Levees, Floodwalls, Embankment Dams, and Appurtenant Structures* (2009).

14 3. The Army Corps adopted this policy without completing an Environmental
15 Assessment (“EA”) or an Environmental Impact Statement (“EIS”), as required by the provisions
16 of NEPA and the Corps’ own regulatory requirements.

17 4. Numerous ponderosa pine trees line Rosenberry Drive, in Coeur d’Alene (“City”),
18 Idaho, which forms the top of a levee built in the 1940’s known as the Rosenberry Levee. The
19 trees are central to recreation and aesthetics along the west and south side of North Idaho College
20 and characterize the beach west of City Park. Lake Coeur d’Alene is south of the Rosenberry
21 Levee. The headwater of the Spokane River is west of the Rosenberry Levee.

22 5. In 2010, the Army Corps inspected the Rosenberry Levee. Following the
23 inspection, the Army Corps issued a Final Periodic Inspection Report for the Rosenberry Levee.

1 Seattle District, United States Army Corps of Engineers, Department of the Army, Final Periodic
2 Inspection Report, Coeur d'Alene Flood Control Project (2010).

3 6. The Final Periodic Inspection Report requires the City to remove all the woody
4 vegetation on and within fifteen feet of the toe of the Rosenberry Levee. The Final Periodic
5 Inspection Report cites the ETL when requiring the removal of the Trees. The Army Corps did
6 not conduct an EA or an EIS when it ordered the City to remove the trees in its Final Periodic
7 Inspection Report of the Rosenberry Levee.

8 7. The Army Corps' actions will result in the removal of almost all trees on all
9 levees nationwide, and mandates the removal of the trees on the Rosenberry Levee in Coeur
10 d'Alene.

11 8. The Army Corps does not intend to conduct an EA or an EIS for the impacts of
12 removing the trees on the Rosenberry Levee. Nor does the Army Corps intend to conduct an EA
13 or an EIS for the impacts of removing trees on levees nationwide. Without action by the Court,
14 there will never be an EA or an EIS to analyze the impacts of removing the trees from the
15 Rosenberry Levee, or removing trees from other levees nationwide.

16 **II. JURISDICTION**

17 9. Federal jurisdiction over this action is appropriate because this issue arises under
18 federal law. 28 U.S.C. § 1331. The relief sought is appropriate under 28 U.S.C. § 2201
19 (declaratory relief), § 2202 (injunctive relief). This action arises under the laws of the United
20 States, including NEPA, 42 U.S.C. §§ 4321-70, and the Administrative Procedure Act, 5 U.S.C.
21 §§ 553, 701-06, and implementing regulations established pursuant to these federal statutes. An
22 actual, concrete, imminent, and justiciable controversy exists between Plaintiff and Defendants.
23 The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705-06.

1 compliance with NEPA for actions within district boundaries. The Seattle District boundary
2 contains Northern Idaho, including the City of Coeur d'Alene and the Rosenberry Levee.

3 Defendant Estok is sued in his official capacity.

4 14. Defendant JAMES C. DALTON is the Chief of Engineering and Construction for
5 the Army Corps. Dalton is responsible for policy, program, and technical expertise in the
6 execution of design and construction programs for the Army Corps. Dalton signed the ETL.
7 Dalton's name is also the only name to appear on the three-page draft EA/finding of no
8 significant impact (FONSI) issued after the ETL. Defendant Dalton is sued in his official
9 capacity.

10 15. Defendant BRIAN APPLEBURY is the Army Corps Seattle District
11 Representative on the Inspection Team that created the Final Periodic Inspection Report. The
12 inspection report cites the ETL as the policy for removing the trees. Defendant Applebury is
13 sued in his official capacity.

14 16. Defendant MARK OHLSTROM is the Army Corps Seattle District Engineering
15 Division Chief. Ohlstrom transmitted the Final Periodic Inspection Report to the City. The
16 report requires the City to remove the trees without environmental review. Defendant Ohlstrom
17 is sued in his official capacity.

18 **V. STATUTORY FRAMEWORK**

19 **ADMINISTRATIVE PROCEDURE ACT**

20 **Agency Rulemaking**

21 17. Under 5 U.S.C. § 553 agencies promulgating rules must publish the new rule in
22 the Federal Register and open the rule to public comment at least 30 days in advance of the
23 enactment of the rule. Agency documents are considered to be rules that require legislative

1 rulemaking procedures found in 5 U.S.C. § 553 when they are applied in a way that indicates
2 they are binding. *General Electric Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.D.C. 2002). A
3 document has a practical binding effect if it leads a reasonable person to believe it “will bring
4 adverse consequences, such as ... denial of an application.” *Id.* at 383 (citation omitted).

5 **Arbitrary and Capricious Agency Action**

6 18. Under the Administrative Procedure Act (APA), “[any] person suffering legal
7 wrong because of agency action, or adversely affected or aggrieved by agency action . . . is
8 entitled to judicial review . . .” 5 U.S.C. § 702. By its own terms, the APA independently
9 authorizes judicial review of “final agency action[s] for which there is no other adequate remedy
10 in court.” *Id.* at § 704. Under the APA, federal district courts are required to “compel agency
11 action unlawfully withheld or unreasonably delayed” and “to hold unlawful and set aside agency
12 action, findings, and conclusions of law found to be . . . arbitrary, capricious, an abuse of
13 discretion or otherwise not in accordance with law . . .” *Id.* at § 706(1), (2)(A).

14 **NATIONAL ENVIRONMENTAL POLICY ACT**

15 19. NEPA requires an agency to prepare an EIS for all “major Federal actions
16 significantly affecting the quality of the environment.” 42 U.S.C. § 4332(2)(C). NEPA
17 compliance must take place at the earliest possible time to ensure informed decision-making. 40
18 C.F.R. §§ 1501.2, 1502.5. NEPA is a process-oriented statute that seeks to ensure that agencies
19 make “informed and well-considered decisions.” *Robertson v. Methow Valley Citizens Council*,
20 490 U.S. 332, 350 (1989). The agency must take a hard look at the adverse impacts of all major
21 federal actions that may have a significant effect on the human environment through a thorough
22 environmental analysis. *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d
23 1233, 1238-39 (9th Cir. 2005). The Ninth Circuit holds that “agency action may constitute a

1 ‘major Federal action’ even though the program does not direct any immediate ground-breaking
2 activity.” *California Wilderness Coalition v. U.S. Dep’t of Energt*, 631 F.3d 1072, 1098 (9th Cir.
3 2011). A major federal action is one that changes the *status quo*. *Id.* at 1099 n.28.

4 20. Under the APA, agency actions are normally reviewed under the arbitrary and
5 capricious standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).
6 However, the Ninth Circuit narrows the scope of *Marsh* and instead applies a less deferential
7 reasonableness standard for NEPA threshold decisions based on legal determinations. *California*
8 *ex rel. Lockyer v. U.S. Dept. of Agriculture.*, 575 F.3d 999, 1011-12 (9th Cir. 2009); *Alaska*
9 *Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d. 723, 727 (9th Cir. 1995);
10 *Northcoast Environmental Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998); *Kern v. U.S.*
11 *Bereau of Land Mgmt.*, 284 F.3d 1062, 1070 (9th Cir. 2002).

12 21. The Ninth Circuit uses a low threshold for determining whether a project may
13 have a significant effect on the environment. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468
14 F.3d 549, 562 (9th Cir. 2006). The appropriate question to ask in regard to significance is
15 whether there is a “substantial question as to whether a project may have a significant effect.”
16 *Id.*

17 22. As a preliminary step, an agency prepares an EA to determine whether the project
18 may have a significant impact on the environment. 40 C.F.R. § 1508.9; *Blue Mts. Biodiversity*
19 *Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *Salmon River Concerned Citizens v.*
20 *Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). If a question is raised as to whether a significant
21 impact may occur an EIS must be prepared. *Klamath Siskiyou Wildlands*, 468 F.3d at 562. If the
22 EA finds no significant impact the agency issues a FONSI. *Blue Mts. Biodiversity Project*, 161
23 F.3d at 1212.

1 23. When an agency determines that they will not conduct NEPA for an agency
2 action they must provide a “convincing statement of reasons why potential effects are
3 insignificant” so that the court can determine whether the agency took a “‘hard look’ at the
4 potential environmental impact of the project.” *California Wilderness Coal. v. U.S. Dept. of*
5 *Energy*, 631 F.3d 1072, 1097-98 (9th Cir. 2011) (quoting *The Steamboaters v. F.E.R.C.*, 759
6 F.2d 1382, 1393 (9th Cir. 1985)). This “statement of reasons is crucial to such a determination”.
7 *Steamboaters*, 759 F.2d at 1393.

8 24. The Army Corps’ regulations implementing NEPA define actions that normally
9 require an EIS, that normally require only an EA, and that are categorically excluded from
10 NEPA analysis. 33 C.F.R. § 230.6, 230.7, 230.9. For example, “[a]ctions normally requiring an
11 EIS are: . . . (b) Proposed changes in projects which increase size substantially or add additional
12 purposes; and (c) Proposed major changes in the operation and/or maintenance of completed
13 projects.” § 230.6.

14 25. The Army Corps defines “[a]ctions normally requiring an EA, but not an EIS” to
15 include:

- 16 (a) Regulatory Actions. Most permits will normally require only an EA.
17 (b) Authorized Projects and Projects Under Construction. Changes which may be
18 approved under the discretionary authority of the Secretary of the Army.
19 (c) Continuing Authorities Program. Projects recommended for approval of the
20 Chief of Engineers under the following authorities:
21 (1) Section 205, Small Flood Control Authority [Section repealed in 1980];
22 . . .
23 (d) Construction and Operations and Maintenance. Changes in environmental
24 impacts which were not considered in the project EIS or EA. Examples are
25 changes in pool level operations, use of new disposal areas, location of bank
26 protection works, etc.

27
28 33 C.F.R. § 230.7.

1 **VI. FACTS**

2 26. In 2009, The Army Corps issued the ETL without any NEPA analysis nor
3 pursuant to the required procedures of agency rulemaking. The ETL mandates a uniform policy
4 for all of the nation’s levees to be free from woody vegetation unless a variance is granted. The
5 ETL’s policy for vegetation management ignores regional environmental differences. This
6 policy is contrary to previous tolerance of trees on levees. The ETL is a change in the Army
7 Corps’ levee management. The ETL’s policy governs approximately 14,000 miles of levees
8 across the country.

9 27. In 2010, the Army Corps completed an inspection of the Rosenberry Levee in
10 order for the City to update its Federal Emergency Management Agency (“FEMA”) certificate.
11 Following the inspection, the Army Corps issued a Final Periodic Inspection Report for the
12 Rosenberry Levee. The report requires the City to remove all the trees on the Rosenberry Levee
13 and within fifteen feet of the toe of the Rosenberry Levee in order to be acceptable for Army
14 Corps certification. The report cites the ETL for its requirement to remove the trees from the
15 Rosenberry Levee.

16 28. The Army Corps never conducted NEPA analysis for the ETL nor for the Final
17 Periodic Inspection Report. The Army Corps has not indicated at what level NEPA analysis will
18 take place. The Army Corps has relied upon the ETL and the Final Periodic Inspection Report in
19 its decisions regarding vegetation maintenance at the Rosenberry Levee.

20 **The Army Corps failed to conduct any legislative rulemaking procedures required by the**
21 **APA**
22

23 29. The Army Corps did not publish the ETL in the Federal Register. The Army
24 Corps did not make the ETL available for public comment prior to issuing the letter. The Army
25 Corps did not provide for a comment period or publication in the Federal Register 30 days before

1 implementing the ETL. The ETL is not an interpretive rule nor a general statement of policy.
2 The ETL is used as a minimum requirement to have vegetation free levees. The ETL contains
3 language that makes the ETL a document that has a binding obligation on levee sponsors. When
4 analyzing whether the language of a document creates a binding requirement, courts give greater
5 deference to the language used in the document than they give to the agency's characterization of
6 the document.

7 30. The introduction to the ETL states:

8 1. Purpose. This ETL provides guidelines to assure that landscape planting and
9 vegetation management provide aesthetic and environmental benefits without
10 compromising the reliability of levees, floodwalls, embankment dams, and
11 appurtenant structures. It is important to note that all minimum guidelines
12 presented herein are just that—minimums. The dimensions of the vegetation-free
13 and root-free zones defined in this document provide the minimum acceptable
14 buffer between vegetation and flood damage reduction structures. For each
15 individual project, the design team must consider whether or not these minimums
16 are adequate to the specific needs and conditions of the project.

17
18 **2. Applicability.** This ETL applies to all USACE Commands having Civil Works
19 responsibilities and to all flood damage reduction projects for which USACE has
20 responsibility for design, operation, maintenance, inspection, or certification.
21 Applicability to non-federal projects is as follows: under the Rehabilitation and
22 Inspection Program (RIP), the USACE performs inspections of non-federal
23 projects (i.e. projects built by local communities then incorporated into the RIP)
24 under ER 500-1-1 and the provisions of Public Law 84-99.

25
26 ETL at 1. Because the ETL states that the guidelines provided therein are “minimums,” there
27 can be no other interpretation of that language besides being a binding requirement. The ETL
28 later states that the guideline “has established the minimum acceptable width of the vegetation-
29 free zone at 15 feet. Other than by variance, . . . the single exception to this 15-foot minimum
30 requirement arises in the case of an existing project” that interferes with current real estate
31 interests. ETL at 2-1 to 2-2.

1 31. The ETL is binding on levee sponsors. As such, the Army Corps is required to
2 comply with the APA’s rulemaking procedures pursuant to 5 U.S.C. § 553.

3 **The Army Corps failed to conduct NEPA analysis for the ETL**

4 32. The “ETL provides guidelines to assure that landscape planting and vegetation
5 management provide aesthetic and environmental benefits without compromising the reliability
6 of levees, floodwalls, embankment dams, and appurtenant structures.” ETL at 1. The ETL
7 applies to all Army Corps “[c]ommands having Civil Works responsibilities and to all flood
8 damage reduction projects for which [the Army Corps] has responsibility for design, operation,
9 maintenance, inspection, or certification.” *Id.* The ETL also applies to “non-federal projects (i.e.
10 projects built by local communities then incorporated into the [Rehabilitation and Inspection
11 Program (RIP)]) under ER 500-1-1 and the provisions of Public Law 84-99.” *Id.* The Army
12 Corps requires levee sponsors to apply for a variance in order to deviate from the ETL’s
13 vegetation free requirements. Process for Requesting a Variance From Vegetation Standards for
14 Levees and Floodwalls, 74 Fed. Reg. 6364, 6366 (Feb 9, 2010).

15 33. The ETL “is intended as a guide for safe design and not as a restriction to the
16 initiative of designers. These guidelines should be used with reasonable judgment and
17 practicality, tailored to the specific requirements and conditions of each individual project.”
18 ETL at 1-1. However, the Army Corps has not followed its express purpose of using the ETL as
19 “guidelines” and instead enforces the ETL as policy.

20 34. The City intends to comply with the Army Corps requirements while finding
21 some way to preserve the mature trees. Letter from Gordon Dobler, City Engineer, City of
22 Coeur d’Alene, to Mark Ohlstrom, Chief Engineering Division, Seattle District, Corps of

1 Engineers, Department of the Army (Aug. 4, 2011). The City intends to develop a specific plan
2 “within the two year time frame for compliance.” *Id.*

3 35. The Army Corps has not published the ETL in either the Federal Register or the
4 Code of Federal Regulations. However, the Army Corps did publish its “Process for Requesting
5 a Variance From Vegetation Standards for Levees and Floodwalls” in the Federal Register. 75
6 Fed. Reg. 6364. This regulation reads

7 1. *Purpose.* This policy guidance letter revises the procedures for obtaining
8 variances from U.S. Army Corps of Engineers (USACE) mandatory vegetation-
9 management standards for levees, floodwalls, and appurtenant structures
10 contained in Engineer Technical Letter (ETL) 1110-2-571 – *Guidelines for*
11 *Landscape Planting and Vegetation Management at Levees, Floodwalls,*
12 *Embankment Dams, and Appurtenant Structures.* All vegetation variances, both
13 new and existing, are required to seek approval through the process described in
14 this policy guidance letter.

15
16 *Id.* By publishing the variance regulation the Army Corps is further acknowledging that the ETL
17 mandates vegetation removal on all the Nation’s levees unless the levee sponsor timely applies
18 for a variance.

19 36. Army Corps’ regulations require the Army Corps to conduct NEPA analysis for
20 the ETL. The Army Corps is required to conduct NEPA analysis on the ETL because the ETL
21 proposes a “major change in the operation and/or maintenance of completed projects.” 33 C.F.R.
22 §230.6(c). Further, the Army Corps is required to conduct NEPA analysis on the ETL because
23 the ETL creates a change in environment impacts that were not considered in the project EIS or
24 EA. 33 C.F.R. §230.7(d). The question as to whether the Army Corps is required to conduct
25 NEPA analysis is a legal determination.

26 37. Rather than tailoring the ETL “guidelines” to the specific requirements and
27 conditions of each project, the Army Corps created a variance process putting the onus of
28 demonstrating the inappropriateness of the ETL’s policy on the levee sponsor. Process for

1 Requesting a Variance from Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. 6364
2 (Feb. 9, 2010). The variance process, however, contains non-discretionary limits to the locations
3 of acceptable woody vegetation on levees. *Id.*, § 9.e. Even with a variance, the Corps would
4 require most of the trees on the Rosenberry Levee to be removed. The policy framework created
5 in the ETL and variance do not allow for the retention of most of the mature trees on the
6 Rosenberry Levee. Their inevitable removal, therefore, should be subject to environmental
7 review.

8 38. The ETL is a major agency action that has a significant impact on the human
9 environment. Proper environmental review requires the Army Corps to conduct site-specific
10 analysis on the impacts of tree removal on levees. *See Oregon Nat'l Res. Council v. United*
11 *States Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006) (finding an EA was inadequate
12 because it was tiered to documents that do “not contain the requisite site-specific information”
13 about cumulative impacts). Tree removal nationwide has potential adverse impacts including
14 sediment loading in adjacent streams and rivers, destruction of habitat for wildlife, and
15 destruction of recreational and aesthetic values to citizens visiting the levees or using the levees
16 as parks.

17 39. The Army Corps conceded that the ETL is a major agency action by issuing a
18 subsequent draft EA/FONSI specifically for the draft variance process. The only NEPA
19 document the Army Corps created for the ETL is the three-page draft EA/FONSI. The Corps
20 never issued a final EA/FONSI for the variance process. The draft EA/FONSI only addresses
21 the variance permitting process. By issuing the draft EA/FONSI, the Army Corps recognizes
22 that it is required to conduct NEPA analysis. An EA/FONSI would not have been necessary if
23 the variance process was not a final “major federal action significantly affecting the quality of

1 the human environment.” 42 U.S.C. § 4332(2)(C). The Army Corps attempted to comply with
2 NEPA for the variance process, but not for the ETL.

3 40. The ETL raises substantial questions in regard to whether the removal of
4 vegetation on levees may have a significant effect on the environment. The environmental
5 impacts of trees on levees are unique and uncertain and thus require site-specific analysis. In
6 July 2011, the Army Corps, itself, acknowledged the highly unique and uncertain effect of trees
7 on levees, stating,

8 [b]ecause of the extreme variability in geology, tree species, climate, and soils,
9 the impact of trees on levees must be analyzed on a case-by-case basis. However,
10 this study does reveal that the tree weight, tree location, root system, and wind
11 loads are all significant parameters that must be taken into account when
12 evaluating the effect of a tree on slope stability for a particular site.

13 Maureen K. Corcoran et al., Engineer Research and Development Center, United States Army
14 Corps of Engineers, Department of the Army, *Initial Research into the Effects of Woody*
15 *Vegetation on Levees: Vol. IV: Summary of Results and Conclusions* 29-30 (2011), available at
16 http://wri.usace.army.mil/woody_vegetation_research.html.

17 41. The Army Corps has not conducted, and does not intend to conduct, NEPA
18 analysis for the ETL’s vegetation management policy. The new variance process in the ETL
19 supersedes all preexisting variances and requires all levee sponsors who intend to retain woody
20 vegetation to apply for a variance by September 30, 2010. Process for Requesting a Variance
21 From Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. at 6366. Because of the
22 short and limited time frame the Army Corps provided for receiving a variance, and the Army
23 Corps’ claim that NEPA analysis shall happen at the variance process, conducted by the levee
24 sponsor, the Army Corps created a process that excludes NEPA analysis for the ETL unless an

1 applicant timely applied for a variance. The Army Corps' variance process requires
2 environmental review if trees are retained, but not if trees are removed.

3 42. The City lacks the ability to receive a variance because the time limit on receiving
4 a variance has passed. The City's only option to maintain Army Corps certification for the
5 Rosenberry Levee is to remove the trees. KEA has no other option but to challenge the Army
6 Corps' neglect of NEPA in order to retain the trees on the Rosenberry Levee.

7 43. In addition, the Army Corps' variance process explicitly states that "no vegetation
8 variance involving woody vegetation, as defined in ETL 1110-2-571 shall be granted for the
9 following portions of a levee: The upper third of the river-side (or flood-side) slope, the crown,
10 the land-side (or protected-side) slope, or within 15 feet of the land-side (or protected-side) toe
11 (subject to preexisting right-of-way)." Process for Requesting a Variance From Vegetation
12 Standards for Levees and Floodwalls, 75 Fed. Reg. at 6366, § 9.e. In other words, the variance
13 process can only be used to retain woody vegetation within fifteen feet of the levee on the river-
14 side and on the lower two-thirds of the river-side slope. On the Rosenberry Levee, the mature
15 trees grow on both sides of the levee. Most of the trees on the Rosenberry Levee are not eligible
16 for a variance under the Army Corps' process.

17 44. The variance process attempts to shift the burden of environmental review to the
18 levee sponsor. Yet, in the variance regulation, the Army Corps still recognizes that it is
19 responsible for compliance with NEPA: "[The Army Corps] ultimately remains responsible for
20 ensuring that [the Endangered Species Act] and other environmental compliance obligations are
21 met." Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls,
22 75 Fed. Reg. at 6366, § 11.

1 47. The Army Corps issued inspection reports of the Rosenberry Levee for the years
2 1986, 1990-92, 1995, 1999, 2002-05, 2007, and 2010. No vegetation issues had been noted
3 between 1995 and 2010. In 2007, the Army Corps rated the Rosenberry Levee “Acceptable.”
4 The Army Corps’ inspection reports of the Rosenberry Levee between the 1995 and 2010 reports
5 did not find fault with the trees on the Rosenberry Levee. Many of those same trees continue to
6 grow on the Rosenberry Levee. Therefore, removing these mature trees is not a routine
7 operation or maintenance action. Removing the Trees is a major change in the operation and
8 maintenance of the Rosenberry Levee.

9 48. The Rosenberry Levee was built as a flood control structure. Today, it serves
10 additional purposes, including recreation and environmental benefits associated with mature
11 riparian trees. Removing the trees may adversely affect these additional purposes.

12 49. The issuance and reliance on the ETL for vegetation management on the
13 Rosenberry Levee changes the *status quo* of levee management. The unknown environmental
14 impacts of such a change raise questions as to whether the ETL may have a significant
15 environmental impact on the human environment. According to Army Corps’ regulation,
16 changes in environmental impacts due to a change of maintenance directives not considered in
17 the non-existent EA/EIS for the Rosenberry Levee triggers the Army Corps’ regulatory
18 requirements to draft, at the minimum, an EA. 33 C.F.R. § 230.6(c).

19 50. There are numerous social, environmental, and economic benefits to urban trees.
20 Social benefits include (a) making paved areas cooler and more comfortable through shading, (b)
21 mitigating urban heat islands, (c) cooling the air, (d) reducing stress and mental fatigue to people,
22 (e) reducing crime, (f) improving health, (g) reducing noise, and (h) improving road safety.
23 Urban trees provide environmental benefits, including (i) improving air and water quality, (j)

1 preventing water runoff and soil erosion, (k) interception of stormwater and floodwater, (l)
2 reducing pollutant loading, (m) reducing runoff volumes by storing rainfall, (n) sequestration of
3 carbon dioxide, (o) absorption of air pollutants, including ozone, nitrogen dioxide, and
4 particulates, (p) reducing soil erosion by diminishing the impact of raindrops on barren surfaces,
5 and (q) providing wildlife habitat. Urban trees provide economic benefits including (r)
6 increasing property value, (s) positive effects on consumer behavior and community
7 development, (t) extending road surface life due to shading, (u) decreasing costs for stormwater
8 controls, (v) decreasing hospital visits caused by air pollutants, (w) historical significance, (x)
9 aesthetic qualities, and (y) horticultural value.

10 51. Many of these benefits are significantly increased with large-stature trees.

11 52. The Army Corps' vegetation removal policy in the ETL may cause numerous
12 significant impacts including, direct, indirect, and cumulative ecological, aesthetic, historic, and
13 cultural impacts. The impacts of the ETL may be significant considering both context and
14 intensity. The policy may impact aesthetic resources on the Rosenberry Levee by removing the
15 trees. The policy may impact the scenic character of North Idaho College. Tree removal may
16 impact community members including college students, boaters, tourists, and residents who use
17 the Rosenberry Levee as a park. The policy may impact habitat in and among the trees. The
18 policy may impact the water quality and riparian zone of Lake Coeur d'Alene and the Spokane
19 River. The Army Corps makes no indication of analyzing the impacts of tree removal when it
20 required removal in the Final Periodic Inspection Report.

1 **VII. CAUSES OF ACTION**

2 **VIOLATION OF APA:**

3 **Failure to Comply with the APA's Rulemaking Procedures**

4 53. All Allegations set forth above are incorporated herein by reference.

5 54. The Army Corps failed to publish the ETL in the Federal Register.

6 55. The Army Corps failed to provide a comment period for the ETL.

7 **VIOLATION OF NEPA AND APA:**

8 **Failure to Complete Environmental Review on the Engineering Technical Letter**

9 56. All allegations set forth above are incorporated herein by reference.

10 57. The Army Corps violated NEPA, the APA, and their implementing regulations by
11 failing to prepare an EA or EIS for the ETL.

12 58. The Army Corps' issuance of the ETL without NEPA analysis is unreasonable,
13 arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. 5
14 U.S.C. § 706(2)(A).

15 **VIOLATION OF NEPA AND APA:**

16 **Failure to Complete Environmental Review on the Final Periodic Inspection Report**
17 **for the Coeur d'Alene Flood Control Project**

18 59. All allegations set forth above are incorporated herein by reference.

19 60. The Army Corps violated NEPA, the APA, and its implementing regulations by
20 failing to prepare an EA or EIS for the Final Periodic Inspection Report of the Coeur d'Alene
21 Flood Control Project, including the impacts of removing the trees on the Rosenberry Levee.

22 61. The Army Corps' issuance of the Final Periodic Inspection Report without NEPA
23 analysis is unreasonable, arbitrary and capricious, an abuse of discretion, and otherwise not in
24 accordance with the law. 5 U.S.C. § 706(2)(A).
25

1 **VIII. RELIEF REQUESTED**

2 Plaintiffs respectfully request that this Court enter judgment against the Army Corps as
3 follows:

- 4 A. Declaring that the ETL and Final Periodic Inspection Report were adopted in an
5 arbitrary or capricious manner and is not in accordance with the law, including NEPA,
6 42 U.S.C. § 4332(2)(C); the APA, 5 U.S.C. §§ 553 702, 704, and 706(a)(2); and
7 applicable federal regulations, including 40 C.F.R. § 1501.4 and 40 C.F.R. § 1506.
8 B. Ordering the Army Corps to comply with NEPA and the APA.
9 C. Vacating and returning the ETL and the Final Periodic Inspection Report to the Army
10 Corps for compliance with NEPA and the APA.
11 D. Enjoining the Army Corps from taking any action, including not certifying a levee or
12 taking no action, that causes any affected levee sponsor to remove vegetation from
13 levees, until the Army Corps complies with NEPA and the APA.
14 E. Awarding Plaintiffs their costs and reasonable attorney’s fees incurred in connection
15 with this dispute as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412.
16 F. Granting any other relief the Court deems just and proper.

17
18 Respectfully submitted,

19 Dated, December 7, 2011

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